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15 IN THE UNITED STATES BANKRUPTCY COURT

16 DISTRICT OF OREGON

17 Peter M. Bucklin, an individual, dba PMB	)	Case No. 10-64467-fra11
18 Development Co., and dba the Peter M.	)	
19 And Joan B. Bucklin Revocable Trust,	)	PREMIERWEST BANK'S
	)	OPPOSITION TO DEBTOR'S
20 Debtor.	)	MOTION FOR INTERIM USE
	)	OF CASH COLLATERAL AND
	)	DEMAND FOR ADEQUATE
	)	PROTECTION

21 PremierWest Bank (hereinafter "Premier") by and through the undersigned  
22 attorneys, hereby objects to the Debtor's Motion for Interim Use of Cash Collateral  
23 (the "Motion") and Demands Adequate Protection. This objection is based on the  
24 Declarations of Thea Lance (the "Lance Declaration"), and the files and records  
25 herein.  
26

1) Premier is a secured creditor of the Debtor. It does not consent to the use of any of its cash collateral by the Debtor and demands adequate protection.

The Debtor's Motion must be denied for the following reasons:

a) The Debtor does not provide adequate protection to Premier for the use of cash collateral;

b) Pursuant to § 552(b) Premier has a duly perfected security interest provided by Debtor in the form of an assignment of rents on the Eagle Point Mall Property and the Vacaville Mall Property<sup>1</sup>. Additionally, in an Oregon Judicial Action, a Receiver was duly appointed to collect rents and oversee the management and operation of the Oregon properties, and

c) The bankruptcy estate only owns partial interest in properties and it seeks to collect all rents for the benefit of the Debtor only.

As such, Premier is entitled to collect rents (or continue to have the Receiver collect rents) and the Debtor should not be allowed to utilize the cash collateral.

### **Statement of Facts**

The nature of Premier's and the Debtor's relationship is set forth in great detail in the Complaints that were filed in Jackson County, Oregon on October 8, 2009, Case No. 09-4683-E2 and, in Solano County, California, on December 11, 2009, Case No. FCS034851 (hereinafter referred to as the "Oregon Complaint" and "California Complaint"). True and correct copies of the Complaints (without exhibits) are attached as Exhibits 1 and 2, respectively, to the Lance Declaration.

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<sup>1</sup> Debtor refers to the Vacaville Mall Property as Berryessa. For the purposes of this Motion the Vacaville Mall Property and Berryessa are one and the same.



On or about June 10, 2010, a hearing was held on appointment of Receiver for all properties in default in Oregon. Premier had previously been provided an assignment of rents from Debtor on the Eagle Point Mall Property. Lance Declaration, Exhibit 3. On June 23, 2010, a Receiver was ordered pursuant to the Jackson County Court. Lance Declaration, Exhibit 6. The Receiver was ordered to collect rents on the following Properties:

- 1) Eagle Point Mall located at 10522, 10534, 10546, 10558 and 10586 Highway 62, Eagle Point, Oregon; 22266 Hwy.,
- 2) 22266 Hwy. 62, Shady Cove, Oregon;
- 3) 33 Broken Stone Way, Eagle Point, Oregon, and
- 4) 151 Morning Dove Trail, Eagle Point, Oregon,

Since the Appointment of Receiver, the Receiver has collected July rents. Pursuant to an interim Agreement with Debtor, those rents and August rents are still being held by the Receiver pending the decision of this Court on Debtor's Motion for Cash Collateral.

Attached to the Lance Declaration as Exhibit 4 is a duly recorded and perfected Assignment of Rents for the Vacaville Mall property that was signed by Debtor and co-borrowers Michael and Katie Hartmann.

### **DISCUSSION**

#### **A. Premier is not Adequately Protected.**

Premier is not adequately protected and the Debtor cannot otherwise use the cash collateral (the "rents") without providing adequate protection. The Debtor has the burden of proof on the issue of adequate protection and absent court order to the

1 contrary, Debtor must obtain consent of Premier before such cash collateral can be  
2 utilized by the Debtor. § 363(c)(2) and (p)(1). Premier does not give consent.

3 The Debtor has proposed that Premier is adequately protected by future liens  
4 for future rents. However, Debtor has not filed any bankruptcy schedules that  
5 demonstrate adequate protection at the time of filing this objection. Since the Debtor  
6 has the burden of proof, a blanket statement that creditors will be adequately  
7 protected by a replacement lien in future rents is simply made without adequate  
8 justification.  
9

10 In addition, each month that goes by, Premier suffers diminution of value to  
11 their property interests. Attached to the Lance Declaration as Exhibit 5 is a list of  
12 damages that will be incurred by Premier for each month no payments are made as  
13 well as a list of unpaid taxes on the properties all demonstrating diminution of value  
14 of the collateral.  
15

16 Further, the proposed budget provided by Debtor to sequester rents to pay his  
17 attorney fees and pay his salary for management of the properties is exorbitant and  
18 completely without justification. Debtor has proposed a budget of \$25,000 per month  
19 to pay administrative costs plus \$15,000 for salaries, presumably to be paid to  
20 Debtor.

21 Debtor cites to several cases outside the 9<sup>th</sup> Circuit that have allowed a debtor  
22 to use cash collateral for rents to carry on its business. However, those cases are  
23 distinguishable from the facts of this case and are not dispositive. In In re  
24 Scottsdale Medical Pavilion, 159 B.R. 295, 302-303 (Bankr. 9th Cir. 1993) the 9<sup>th</sup>  
25 Circuit denied Debtors motion for sequestration of rents subject to assignment of  
26



1 rents and denied use of cash collateral where no adequate protection was offered to  
2 secured creditor, aff'd, 52 F.3d 244 (9th Cir. 2005). See also, In re Orchards Village  
3 Investments, LLC, 405 BR 341 (Dist. Or. 2009)(Where debtor failed to meet its  
4 burden to provide adequate protection of use of secured creditor's cash collateral,  
5 court prohibited debtors use of cash collateral even though it prevented the debtor  
6 from a readily available source of funds to pay administrative expenses in Chapter  
7 11.)

8  
9 Based upon the limited materials provided in Debtor's motion, it appears that  
10 only 25% of any of the rent proceeds would be left over for protection payments to  
11 secured creditors. As such, Debtor should not be allowed to utilize the cash  
12 collateral payments in the form of rent.

13 In addition, Debtor has proposed that he be allowed to collect all rents for all  
14 the properties, even though Debtor only has partial interest in most of the properties.  
15 See, Debtors Motion for Use of Cash Collateral, ¶ 8. Debtor's interest in the Eagle  
16 Point Mall property is only 24%; the Vacaville Mall Property, 50%; the 151 Morning  
17 Dove, 0% (Spouse owns 100%); 33 Broken Stone Way, 25% (Debtor's Wife owns  
18 other 25%); and 50% of the Highway 62 property. Premier questions whether Debtor  
19 is even entitled to collect rents at all when the properties are partially owned by other  
20 individuals.  
21

22 B. Assignment of Rents—11 USC 552(b).

23  
24 Debtor's motion should also be denied because Premier has perfected its  
25 security in rents by duly recording its assignment of rents. At the hearing on this  
26 matter, Premier must prove its entitlement on the "issue of validity, priority or extent

1 of such interest.” 11 USC § 363(p)(2). Debtor has the burden of proof on the issue  
2 of adequate protection. § 363(p)(1). Premier’s assignment of rents takes priority  
3 over rent proceeds.

4 Pursuant to 11 USC § 552 (a), property acquired by the estate (rents) after  
5 the commencement of the case is not subject to any lien that arose from a security  
6 interest entered into prior to the commencement of the case. However an exception  
7 exists under § 552(b) which provides in relevant part:

8  
9 (b) (1) ... if the debtor and an entity entered into a security  
10 agreement before the commencement of the case and if the security  
11 interest created by such security agreement extends to property of the  
12 debtor acquired before the commencement of the case and to  
13 proceeds, products, offspring, or profits of such property, then such  
14 security interest extends to such proceeds, products, offspring, or  
15 profits acquired by the estate after the commencement of the case to  
16 the extent provided by such security agreement and by applicable  
17 nonbankruptcy law, except to any extent that the court, after notice and  
18 a hearing and based on the equities of the case, orders otherwise.

19 As such, pre-petition liens on rents can continue in bankruptcy if the security  
20 interest has been perfected under “applicable non-bankruptcy law.” In In re 1441  
21 Veteran St. Co., 144 F.3d 1288, 1293 (9th Cir. 1998) the Ninth Circuit held that under  
22 Section 552(b), “secured creditors shall enjoy the same rights to post-petition rents  
23 and proceeds that they would have under state law.” So long as Premier  
24 demonstrates a duly perfected security interest in the rents, Debtor is divested of the  
25 rents in bankruptcy subject only to the “equities of the case.”

26 In Butner v. United States, 440 U.S. 48, 54-55, 59 L. Ed. 2d 136 (1979) the  
US Supreme Court held that the law of the state where the property is located  
governs a mortgagee's right to rents in a bankruptcy proceeding. Premier filed an



1 Assignment of Rents on the Eagle Point Mall Property and another on the Vacaville  
2 Mall Property in California.

3 1. Oregon Properties.

4 Under Oregon law, a recorded assignment of rents is perfected upon  
5 recording. Oregon Revised Statutes 86.010 provides:

6 A mortgage of real property is not a conveyance so as to enable the  
7 owner of the mortgage to recover possession of the property without a  
8 foreclosure and sale. This section is not intended as a limitation upon  
9 the right of the owner of real property to mortgage or pledge the rents  
10 and profits thereof, nor as prohibiting the mortgagee or pledgee of such  
11 rents and profits, or any trustee under a mortgage or trust deed from  
12 entering into possession of any real property, other than farmlands or  
13 the homestead of the mortgagor or successor in interest, for the  
14 purpose of operating the same and collecting the rents and profits  
thereof for application in accordance with the provisions of the  
mortgage or trust deed or other instrument creating the lien, nor as any  
limitation upon the power of a court of equity to appoint a receiver to  
take charge of the property and collect the rents and profits thereof.  
(emphasis added)

15 In this case, Debtor, Joan Bucklin and James Ollendick executed an Assignment of  
16 Rents for rents related to the Eagle Point Mall Property. The Assignment of Rents  
17 was duly recorded on September 1, 2006, Lance Declaration, Exhibit 3. Under  
18 Oregon law, ORS 93.643 provides that recording an interest in real property (rents),  
19 is perfection of that security interest. See In re Nendels-Medford Joint Venture 127  
20 BR 658, 666, (Bankr. OR 1991) (proof of security interest in assignment of rents must  
21 be recorded in County where real estate is located). Therefore, under Oregon law,  
22 Premier's security interest in the rents of the Eagle Point Mall are still attached and  
23 continue and entitles Premier to such rent proceeds ahead of the Debtor's interest.  
24  
25  
26

1 Premier is also entitled to the rents for all other Oregon Properties for another  
2 reason as well—the Oregon Court duly granted Premier’s motion to appoint a  
3 receiver to collect rents and manage the Oregon Property. The Receivership was  
4 ordered on June 23, 2010. Pursuant to the Order Appointing the Receiver, the  
5 Receiver is required to collect the rents on the Oregon properties and pay expenses  
6 related to those properties. Any payments after expenses made to Premier require  
7 judicial consent. Keeping a receiver in place during bankruptcy is not a new concept.  
8 In In re Orchards Village Investments, LLC, at 352-355, the Court kept a receiver in  
9 place to collect rents and manage the property pending debtors Chapter 11  
10 bankruptcy.

12 In Midlantic National Bank v. Sourlis, 141, BR 826 (Dist. NJ 1992), the court  
13 went even further. The bankruptcy court applied New Jersey law and held that a  
14 secured creditor with an assignment of rents had a right to adequate protection from  
15 the debtor’s use of the rents in bankruptcy under § 363(c)(2) and (e). Unlike the  
16 situation in this case, the creditor in Midlantic had not previously had a receiver  
17 appointed prior to the bankruptcy filing. See also In re Park at Dash Point L.P., 121  
18 B.R. 850; WD Wash, (1990) (Mortgagee’s motion to sequester rent collected by  
19 bankruptcy debtor was granted since the security interests were fully perfected by  
20 record action.) Scottsdale Medical Pavilion v. Mutual Benefit Life Ins. Co. (In re  
21 Scottsdale Medical Pavilion), 159 B.R. 295 (Bankr. 9<sup>th</sup> Cir, 1993) (Decision to  
22 sequester use of funds held by debtor as rent payments affirmed since rent proceeds  
23 were perfected by an assignment of rents which granted creditor an immediate right  
24 to remittance).



1 As such, under Oregon law, Premier has a perfected security interest in the  
 2 rents and Premier is entitled to receive rental proceeds as payments towards the  
 3 providing it adequate protection.

#### 4 2. California Property.

5 Premier also has a duly perfected Assignment of Rents for the Vacaville Mall  
 6 property. The Assignment was recorded on or about November 29, 2006. Lance  
 7 Declaration, Exhibit 6. Under California Law, an assignment of rents is perfected  
 8 upon filing. California Civil Code § 2938 states in relevant part as follows:  
 9

10 (a) A written assignment of an interest in leases, rents, issues, or profits  
 11 of real property made in connection with an obligation secured by real  
 12 property, irrespective of whether the assignment is denoted as  
 13 absolute, absolute conditioned upon default, additional security for an  
 14 obligation, or otherwise, shall, upon execution and delivery by the  
 15 assignor, be effective to create a present security interest in existing  
 and future leases, rents, issues, or profits of that real property. As used  
 in this section, "leases, rents, issues, and profits of real property"  
 includes the cash proceeds thereof. "Cash proceeds" means cash,  
 checks, deposit accounts, and the like.

16 (b) An assignment of an interest in leases, rents, issues, or profits of  
 17 real property may be recorded in the records of the county recorder in  
 18 the county in which the underlying real property is located in the same  
 19 manner as any other conveyance of an interest in real property,  
 20 whether the assignment is in a separate document or part of a  
 21 mortgage or deed of trust, and when so duly recorded in accordance  
 22 with the methods, procedures, and requirements for recordation of  
 23 conveyances of other interests in real property, (1) the assignment shall  
 24 be deemed to give constructive notice of the content of the assignment  
 25 with the same force and effect as any other duly recorded conveyance  
 26 of an interest in real property and (2) the interest granted by the  
assignment shall be deemed fully perfected as of the time of  
recordation with the same force and effect as any other duly recorded  
conveyance of an interest in real property, notwithstanding a provision  
of the assignment or a provision of law that would otherwise preclude or  
defer enforcement of the rights granted the assignee under the  
assignment until the occurrence of a subsequent event, including, but  
not limited to, a subsequent default of the assignor, or the assignee's

1 obtaining possession of the real property or the appointment of a  
2 receiver. (emphasis added)

3 In In re Goco Realty Fund I, 151 B.R. 241 (N. Dist Cal. 1993), the court  
4 interpreted § 2938 in context of a Chapter 11 bankruptcy. There, the court stated  
5 that not only is perfection required, but the lender was required to take some  
6 enforcement action to obtain the rents. Id. a 248. Here, Premier did just that.  
7 Attached to the Lance Declaration as Exhibit 2 is a copy of the California Complaint  
8 wherein the Bank made immediate demand for the appointment of a receiver to  
9 collect rents and manage the Vacaville property.<sup>2</sup>

### 10 Conclusion

11 Debtor's motion must be denied for the reasons expressed above. Premier  
12 has provided the Court with proof of its security in the ongoing rents for both the  
13 Oregon and California properties. Debtor has not provided adequate protection for  
14 Premier and Debtor is otherwise not entitled to the rents to pay its ongoing expenses.  
15

16 Premier respectfully requests that the Court deny Debtor's Motion, order the  
17 Debtor to sequester any cash for the benefit of the Premier, and grant such other  
18 relief as is just and proper under the circumstances of this case.

19 DATED this 6<sup>th</sup> day of August, 2010.

KELLINGTON, KRACK, RICHMOND,  
20 BLACKHURST & GLATTE, LLP

21 By: /s/ John Blackhurst

22 Erik J. Glatte, OSB # 951720

23 John Blackhurst OSB# 79018

24 Of Attorneys for Plaintiff

25  
26 <sup>2</sup> Premier's California Complaint joined Cascade Acceptance Corporation as a junior lender. Cascade filed for  
bankruptcy which required Premier to seek relief from the automatic stay. The relief from the automatic stay  
was only recently acquired on August 3, 2010.



**CERTIFICATE OF SERVICE**

I hereby certify that on the 6<sup>th</sup> day of August, 2010, I caused to be served the forgoing **PREMIERWEST BANK'S OPPOSITION TO DEBTOR'S MOTION FOR INTERIM USE OF CASH COLLATERAL AND DEMAND FOR ADEQUATE PROTECTION** on the following parties at the following addresses:

Thomas W. Stilley  
1000 SW Broadway #1400  
Portland, OR 97205  
**Debtor's Attorney**

US Trustee, Eugene  
405 E 8<sup>th</sup> Ave #1100  
Eugene, OR 97401-2706  
**US Trustee**

by:

☒ U.S. Postal Service, First Class Mail  
☐ U.S. Postal Service, Certified Mail  
☐ Facsimile

/s/ John Blackhurst  
John Blackhurst, OSB# 79018